



FILED
Dec 31 2008, 9:23 am
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court of appeals and
tax court

APPELLEES PRO SE¹

RONALD G. PIERSON
DEBORAH J. PIERSON
Evansville, Indiana

SAM GATES,)
)
Appellant-Defendant,)
)
vs.) No. 82A04-0807-CV-437
)
RONALD G. PIERSON and)
DEBORAH J. PIERSON,)
)
Appellees-Plaintiffs.)

December 31, 2008

KIRSCH, Judge

¹ The Piersons have not filed a brief, but they have filed a pro se appearance. Additionally, pursuant to Indiana Appellate Rule 17(A), a party of record in the trial court is a party on appeal. *Knight v. Indiana Ins. Co.* 871 N.E.2d 357, 363 (Ind. Ct. App. 2007).

Sam Gates appeals the trial court's grant of summary judgment in favor of Ronald G. and Deborah J. Pierson (the "Piersons"). Gates raises two issues that we restate as:

- I. Whether the trial court should not have granted summary judgment because of alleged defects in the Piersons' designation of evidence; and
- II. Whether the trial court erred by awarding damages to the Piersons that did not result from any breach of the parties' contractual obligations.

We affirm.

FACTS AND PROCEDURAL HISTORY

In September 2002, the Piersons, as sellers, entered into an agreement ("Purchase Agreement") with buyers Gates and Diana Duncan ("Duncan") for the sale and purchase of commercial real estate located in Indiana and Kentucky. Some years later, Gates and Duncan allegedly failed to perform certain obligations under the Purchase Agreement, including failure to make installment payments. Therefore, in February 2007, the Piersons provided written notice to Gates and Duncan and thereafter declared the entire balance to be payable immediately.

The next month, the Piersons entered into a cancellation agreement with Duncan on March 19, 2007, and a separate cancellation agreement ("Cancellation Agreement") with Gates on March 23, 2007. Those cancellation agreements provided that Gates and Duncan were in default on the Purchase Agreement and that they desired to be released from the Purchase Agreement, but imposed other obligations on Gates and Duncan, including execution of quitclaim deeds and delivering to the Piersons bills of sale and odometer statements for business vehicles used on the subject real estate.

On May 30, 2007, the Piersons filed a complaint against Gates for breach of contract, alleging in Count I that Gates breached the Purchase Agreement and in Count II that Gates breached the subsequent Cancellation Agreement. The Piersons attached to their complaint the Purchase Agreement and both of the cancellation agreements. About a month later, the Piersons propounded discovery to Gates, including interrogatories and request for admissions. Gates sought and received three extensions of time to answer the discovery request. The trial court's last order stated that Gates's answers were due no later than September 21, 2007 and that no further extensions of time would be granted. *Appellant's App.* at 5, 71.

On October 26, 2007, the Piersons filed a motion for summary judgment, to which they attached: their complaint, the affidavit of Ronald Pierson, the Piersons' discovery requests, the trial court's entry stating that Gates's answers were due no later than September 21, 2007, and Gates's discovery answers executed on October 1, 2007. In their brief in support of the motion for summary judgment, the Piersons listed the facts deemed admitted under the request for admissions.

Gates filed a response to the Piersons' motion. In it, he asserted that: (1) as to Count I (which alleged breach of the Purchase Agreement), the Cancellation Agreement superseded the Purchase Agreement, and thus, there could be no enforcement or breach of the Purchase Agreement; and (2) as to Count II (which alleged breach of Cancellation Agreement), the signature on the Cancellation Agreement was not his, and therefore, the Cancellation Agreement could not be enforced against him. Gates also asserted that there was no attorney

fee provision in the Cancellation Agreement, so he could not be required to pay the Piersons' fees. According to the Chronological Case Summary ("CCS"), the trial court held a hearing on the summary judgment motion December 19, 2007.

By written order, the trial court granted the Piersons' motion for summary judgment as to Count II of their complaint, which alleged that Gates had failed to tender certain property and documents of conveyance as required by the Cancellation Agreement, but the court determined that because the Cancellation Agreement did not provide for attorney fees, the Piersons could not recover fees. The trial court denied summary judgment on Count I of the complaint, finding that the Cancellation Agreement was a novation of the original Purchase Agreement. Gates filed a motion to correct error. Following a hearing, the trial court denied that motion.² Gates now appeals.

DISCUSSION AND DECISION

Before addressing the merits of this appeal, we note that the Piersons have not filed an appellees' brief. When an appellee fails to submit a brief, an appellant may prevail by making a prima facie case of error. *Dominiack Mech., Inc. v. Dunbar*, 757 N.E.2d 186, 188 n.1 (Ind. Ct. App. 2001). Under these circumstances, this court is not required to controvert arguments advanced for reversal, a duty which remains with the appellee. *Id.* We must nevertheless correctly apply the law to the facts in the record in order to determine whether reversal is required. *Id.*

² The record before us does not include the transcript for either the summary judgment hearing or the hearing on the motion to correct error.

I. Grant of Summary Judgment

In this appeal, Gates maintains that the trial court's grant of summary judgment was erroneous. Pursuant to Indiana Trial Rule 56(C), summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *AquaSource, Inc. v. Wind Dance Farm, Inc.*, 833 N.E.2d 535, 538-39 (Ind. Ct. App. 2005). In reviewing a decision upon a summary judgment motion, we apply the same standard as the trial court. *Id.* We do not reweigh the evidence designated by the parties. *Id.*

The moving party bears the burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Id.* Once this burden is met, the non-moving party must respond by setting forth specific facts demonstrating a genuine need for trial, and cannot rest upon the allegations or denials in the pleadings. *Id.* Additionally, Indiana Trial Rule 56(H) provides that “[n]o judgment rendered on the motion shall be reversed on the ground that there is a genuine issue of material fact unless the material fact and the evidence relevant thereto shall have been specifically designated to the trial court.” Consequently, we review only the designated evidentiary material in the record, construing that evidence liberally in favor of the non-moving party, so as not to deny that party its day in court. *Id.*

Here, the Piersons' complaint alleged in Count I that Gates breached the Purchase Agreement and in count II that Gates breached the Cancellation Agreement. The essential elements of breach of contract are the existence of a contract, the defendant's breach thereof,

and damages. *Breeding v. Kye's Inc.*, 831 N.E.2d 188, 190-91 (Ind. Ct. App. 2005). A party breaches a contract when it fails to perform all of the obligations that it has agreed to undertake. *Id.*

After filing their complaint, the Piersons propounded discovery requests to Gates, including a request for admissions under Indiana Trial Rule 36. A request for admission is a “close-ended” inquiry, i.e., it requires, either by admission or denial, an answer that is unambiguous, unequivocal, and without the evasion often characteristic of answers to depositions and interrogatories. *Walker v. Employers Ins. of Wausau*, 846 N.E.2d 1098, 1102 (Ind. Ct. App. 2006). The purpose of an admission is not to “discover” a fact, but to “establish” a fact conclusively. *Id.* Properly used in this manner, requests for admissions streamline the focus of pre-trial investigation and discovery and eliminate the need for unnecessary evidence at trial. *Id.* Requests for admissions under Indiana Trial Rule 36 may, in addition to seeking evidentiary matters, ask for admissions as to legal issues, contentions, and conclusions, if related to the facts of the case. *Cross v. Cross*, 891 N.E.2d 635, 639 (Ind. Ct. App. 2008). Trial Rule 36 requires a party to answer within thirty days or within such time as the trial court allows, and failure to answer within the required time frame results in the requested matter being deemed admitted, i.e., conclusively established.

Here, Gates requested and received from the trial court three extensions of time to answer the discovery requests. The final extension ordered that Gates had until September 21, 2007, to provide his answers to the Piersons. The certificate of service attached to Gates's answers is dated October 1, 2007. Because Gates did not respond to or object to the

Piersons' requests for admission within the time designated by the trial court, the matters contained in the Piersons' discovery request were deemed admitted. *See Walker*, 846 N.E.2d at 1103. Although Rule 36(B) permits the party deemed to have made those admissions to move the trial court for amendment or withdrawal of those admissions, Gates did not file any motion to have his admissions withdrawn or amended.

In this case, the Piersons moved for summary judgment based on the deemed admissions, and the trial court granted the motion in part, finding that the Piersons were entitled to summary judgment on count II of their complaint stemming from breach of the Cancellation Agreement. On appeal, Gates contends that the trial court erred in granting summary judgment because the Piersons "did not meet their initial burden of demonstrating the nonexistence of a genuine issue of material fact." *Appellant's Br.* at 2. Specifically, Gates asserts that the Piersons failed to properly designate evidence in support of their motion, arguing, "For an admission to be used it must be admitted into evidence or administratively notice [sic] in an administrative proceeding under the Administrative Orders and Procedures Act." *Id.* at 6. Gates's argument is misplaced and does not apply in the context of summary judgment. Indeed, we have held, "Admission by operation of T.R. 36 of all facts material to a cause of action by the failure of the admitting party to timely answer requests for admissions leaves nothing more to litigate and will entitle the party who requested the admissions to summary judgment." *Bryant v. County Council of Lake County*, 720 N.E.2d 1, 6 (Ind. Ct. App. 1999) *trans. denied* (2000).

Gates also claims that the trial court should not have considered the admissions because “[t]here was nothing authenticating any of those documents as required by Indiana Rule of Evidence 901.” *Id.* However, he never raised it to the trial court, and it is too late to do so now. *See Gary/Chicago Airport Bd. of Auth. v. Maclin*, 772 N.E.2d 463, 469 (Ind. Ct. App. 2002) (Board waived arguments on appeal that summary judgment affidavit should have been stricken because it was not properly verified or that attachments to affidavit were not certified because Board did not present those arguments to trial court).

Next, Gates argues that the Piersons should not have designated documents in their entirety, for instance the complaint and the request for admissions, and thus the trial court should not have considered those documents. Gates is correct that, although the language of Trial Rule 56(C) permits the parties to determine how to designate, the rule requires specificity, and designating pleadings, discovery materials, and affidavits in their entirety does not meet the specificity requirement of Trial Rule 56(C). *AutoXchange.com, Inc. v. Dreyer & Reinbold, Inc.*, 816 N.E.2d 40, 45 (Ind. Ct. App. 2004). However, even if entire portions of the record are designated, the designation will not fail for lack of specificity if more detailed references to the record are provided in accompanying memoranda in support or opposition to the motion for summary judgment. *Id.* Further, we have held that so long as the trial court is apprised of the specific material upon which a party relies in support of or in opposition to a motion for summary judgment, then the material may be considered. *Id.* at 46.

Here, in their brief in support of their motion for summary judgment, the Piersons stated every fact that was deemed admitted by virtue of the request for admission, including the facts that (1) there was a Cancellation Agreement with Gates, and (2) Gates breached that Cancellation Agreement by failing to comply with provisions outlined in paragraphs 2(b), 2(c), and 2(d) of that agreement, which, among other things, required Gates to execute and deliver certificates of title and odometer readings to nine specified vehicles. The Piersons' summary judgment brief also listed damages suffered as a result of Gates's breach of the Cancellation Agreement. Based on the designated evidence, we find that the Piersons met their burden of establishing a lack of genuine issue(s) that would preclude summary judgment on count II of their complaint.

Accordingly, to avoid summary judgment, the burden shifted to Gates to show the existence of a genuine issue of material fact. Ind. Trial Rule 56(H). Under our trial rules, the nonmovant may not rest on his pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. *McDonald v. Lattire*, 844 N.E.2d 206, 210 (Ind. Ct. App. 2006). That is, the opposing party must designate each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto. *Id.* at 211-12.

In this case, in his response to the Piersons' motion for summary judgment, Gates claimed that a genuine issue existed because the signature on the Cancellation Agreement was not his, stating, "[T]he cancellation agreement was never executed by defendant." *Appellant's App.* at 137. However, he did not provide any evidence relevant to that fact.

That is, Gates did not submit an affidavit or deposition or other evidence. While the general rule is that the trial court “must accept as true those facts alleged by the nonmoving party and resolve all doubts in favor of the nonmovant,” only those facts alleged by the nonmovant and supported by affidavit or other evidence must be taken as true. *McDonald*, 844 N.E.2d at 211-12 (discussing requirement that opposing party must designate each material fact and evidence related thereto). Furthermore, Gates had already admitted in his answer to the Piersons’ complaint that “the Piersons and Gates entered into a Cancellation of Agreement for Purchase and Sale of Real Estate[,]” a copy of which was attached to the complaint. *Appellant’s App.* at 12, 47. Accordingly, Gates has already admitted that he entered into a Cancellation Agreement with the Piersons. He is thus precluded from thereafter claiming that the signature was not his and that the Cancellation Agreement could not be enforced against him. *Robson v. Texas Eastern Corp.*, 833 N.E.2d 461, 466 (Ind. Ct. App. 2005), *trans. denied* (judicial estoppel doctrine seeks to prevent litigant from asserting position inconsistent with one asserted in the same or a previous proceeding).

II. Damages

Gates claims that even if the trial court was not in error when it granted summary judgment to the Piersons, it nevertheless erred when it awarded damages as outlined in Ronald Pierson’s affidavit because those damages were not proven to be caused by the breach of the Cancellation Agreement. Gates argues that the damages claimed by Ronald Pierson are not damages that flow from the alleged breach, but rather are expenses that Pierson would have incurred notwithstanding any breach.

First, Gates did not raise this argument in opposition to summary judgment. His only argument with regard to alleged damages was that the Cancellation Agreement did not provide for attorney fees, and thus the Piersons could not recover attorney fees for any breach of that agreement. The trial court agreed, and did not award the Piersons attorney fees for the reason stated by Gates. However, Gates did not make the argument to the trial court that the list of alleged damages in Ronald Pierson's affidavit were not caused by any breach; that is, he did not move to strike the affidavit, or otherwise oppose the damages, nor did he provide any contrary evidence in his opposition to the Piersons' motion for summary judgment. Once the Piersons demonstrated the lack of a genuine issue of material fact, the burden shifted to Gates to show the existence of a genuine issue of material fact precluding summary judgment and submit the evidence related thereto. He failed to do so.

The trial court did not err in granting summary judgment in favor of the Piersons.

Affirmed.

VAIDIK, J., and CRONE, J., concur.